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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 659

COMCET, INC.,

Petitioner,

vs.

COMMUNICATIONS SATELLITE CORPORATION,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The central issue in this case is whether the District Court, reversed by the Court of Appeals, correctly held that Respondent had failed to prove likelihood of prospective purchaser confusion in its claim for trademark infringement under Section 32(1) of the Lanham Act. The Court of Appeals did not disturb the District Court's findings of fact to the effect that the very expensive products and services involved are purchased for use with complex data processing machinery; that months of negotiation and investigation precede the final decision to purchase; and that the sophisticated technical and executive personnel of the large purchasing corporations are not likely to be confused by Petitioner's name. This reply brief is required by several legal and factual comments on this central issue in Respondent's brief opposing *certiorari.*

On the basic concept of "likelihood of confusion" under the Lanham Act, Respondent indicates (pp. 12-13) that the Court of Appeals' concern with "possibilities" instead of "probabilities" involves only a misuse of a word, which Respondent calls a matter of "semantics." But the Court's references to "possibilities" are too numerous to be disregarded as inadvertent or insignificant. The Court's concern with possibility instead of probability reveals an important misconception of the legal criteria required to be established to sustain a cause of action for infringement under the Lanham Act. The Court's opinion shows further that it ignored the fact that the Respondent had the burden of proving likelihood of confusion by a preponderance of the evidence. Instead, the Court of Appeals erred by requiring the Petitioner to prove there was no possibility of confusion.

Respondent represents (p. 21) that "a large body of consistent precedents" supports its legal theory under the Lanham Act, but neither the Court of Appeals' opinion nor Respondent's brief cites a single infringement decision involving a highly specialized market as we have here. The decisions they rely on deal with pancake flour, ladies' underwear, shoes, clocks, mattresses and other such consumer items sold by brand name and mass marketing techniques. A 1917 case comparing the relationship of pancake flour to pancake syrup is relied upon as the principal authority for the legal consequences flowing from the relationship between sophisticated computers and satellite communications.[1] This case has no relevance here in view of the undisturbed findings of fact of the trial court. Certainly it does not support the wide extension of protection under Section 32(1) of the Lanham Act that is

1. *Aunt Jemima Mills Co.* v. *Rigney & Co.*, 247 F. 407 (2d Cir. 1917), cited in Respondent's brief at p. 10 and Court of Appeals opinion at page B13 of Petition.

required by the position of the Respondent and the Court of Appeals.

In attempting to demonstrate that it had sustained its burden of proof, Respondent represents (p. 5) that evidence in the record and new developments during appellate review indicate that Respondent may eventually serve the general public directly and that its services will be well adapted to computer traffic. There is no factual basis whatever for these statements. In fact they are contrary to the undisturbed findings of fact concerning the marketing of Respondent's and Petitioner's products and services.[2]

Respondent's final point (pp. 22-23) criticizes the Petitioner as a "counterfeiter" and an "imposter" guilty of "plagiarism." There is no factual basis for these accusations. They are, in fact contradicted by the finding of Chief Judge Thomsen (who heard the evidence and observed the credibility of the witnesses) that the Petitioner did not adopt its trademark and trade name "with any intention of using or obtaining the benefit of whatever good will [Respondent] has established for its name and service mark" (Petition, p. A5). This finding was accepted by the Court of Appeals (Petition, p. B6). Respondent's strong

2. While the FCC's policy statement in Docket No. 16495 indicated that Respondent or others might be authorized to provide satellite communications service to major users, such as television networks, the general public would not be a direct user of such services (Docket 16495, Appendix B, p. 36). At the trial two of the Respondent's own witnesses testified that there were time delays which presented practical problems in the use of satellite communications for computer-to-computer data transmission and the verification and correction of such data (Tr. 98, 116-117, 187). Moreover, the FCC Notice of Proposed Rule Making and the Tentative Decision in Docket No. 16979 states that proposed new rule 64.702 would prohibit communications common carriers subject to its jurisdiction from engaging directly or indirectly in data processing services. Thus, Respondent could not provide data processing services nor engage in marketing such services on behalf of any affiliate (Docket No. 16979, pp. 1, 15, adopted April 1, 1970).

but unjustified charge of bad faith is a symptom of its weak legal position.

Accordingly, a writ of certiorari should issue to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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